

EX PARTE OR LATE FILED

Original
ORIGINAL

EX PARTE

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

RECEIVED

JUL 27 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	
)	
SBC Communications, Inc. and BellSouth Corporation)	File No. 0000117778
)	<i>et al.</i>
)	
For consent to Transfer of Control or Assignment of Domestic Mobile Wireless Interests to Alloy, LLC)	DA- 00-1120
)	WT Docket No. <u>00-81</u>

To: Wireless Telecommunications Bureau

RESPONSE TO JULY 21 EX PARTE RESPONSE OF SBC AND BELL SOUTH TO REPLY TO APPLICANT'S RESPONSE TO PETITION TO DISMISS OR DENY

Thumb Cellular Limited Partnership (TCLP), by its attorney, hereby responds to SBC Communications, Inc.'s (SBC) and BellSouth Corporation's (BSC) July 21, 2000 *Ex Parte Response of SBC and BellSouth To Reply to Applicant's Response to Petition to Dismiss or Deny (July 21 Response)*. In response thereto, the following is respectfully submitted:

1) The basic question in this case is whether the Commission's official licensing records show Ameritech, SBC, or BSC as owner in TCLP. If a particular entity is not shown in the Commission's official licensing records as being an owner, any claim to the contrary raises a contractual issue which is best resolved in the appropriate judicial forum.¹

2) Ameritech, SBC, and BSC repeatedly try to make it appear that TCLP is raising a contract issue. That is not the case, of course. The FCC's official ownership records have, since 1991,

¹ Paying heed, of course, to all timeliness constraints in seeking to enforce a contract right.

No. of Copies rec'd
List A B C D E

0+4

EX PARTE

shown that TCLP has two owners and neither one of them is Ameritech, SBC, or BSC. By filing ownership change applications for ownership interests which are not recognized in the Commission's ownership files Ameritech, SBC, and BSC effectively claim that the Commission's ownership records are inaccurate and that the Commission's transfer processes may be used to litigate "SBC's claim."² *July 21 Response*, at 4. Even if the Commission were to litigate contractual disputes, over the course of nearly 10 years, no party objected to the state of the ownership records on file at the Commission. Thus, it is too late in the day for Ameritech, SBC, and BSC to raise their contract issue now.

3) Even if SBC and BSC were correct that TCLP's "claims are not properly before the Commission in this proceeding because they involve state law contract issues," *July 21 Response*, at 1, SBC and BSC utterly fail to explain why their self professed "claim" to an ownership interest, in the face of conflicting, official licensing records which do not show any interest in TCLP being held by Ameritech, SBC, or BSC, is not itself a contractual issue beyond the Commission's jurisdiction. There is no logic to SBC/BSC's position that TCLP cannot raise a contractual ownership issue but that Ameritech/SBC/BSC can. The status quo as reflected by the Commission's official licensing records is that neither Ameritech, SBC, nor BSC are owners in TCLP and Ameritech/SBC/BSC's claim to the contrary is not properly before the Commission.

4) The *July 21 Response*, at 3, criticizes TCLP for failing to cite "numerous provisions of the partnership agreement in the original petition to deny. Of course, this is not a contract case and the partnership agreement was not an issue in the *Petition to Dismiss or Deny*. The partnership

² Ameritech, SBC, and BSC have repeatedly asserted that their interest in TCLP is nothing more than a "claim" to an ownership interest. 47 U.S.C. § 301(d) provides that the Commission regulates "rights" under licenses, the Commission does not regulate contractual "claims" to rights under licenses.

EX PARTE

agreement did not become an issue until SBC/BSC put the partnership agreement into the record in connection with their June 29, 2000 *Response*. Which party is making contractual claims which are contrary to the Commission's official licensing records?—SBC/BSC. Which party filed various contract related documents with the Commission?—SBC/BSC. Which party first argued that those contractual documents support a claim to an ownership interest?—SBC/BSC. SBC/BSC's contention that TCLP is the party raising a contractual issue is not asserted in good faith.

5) After putting the partnership agreement into the record, SBC and BSC criticize TCLP's reference to various sections of the agreement and state that "Thumb's Reply shows why such matters are best left to the courts." *July 21 Response*, at 2.³ TCLP's discussion of various contractual provisions, provisions which were first brought to the Commission's attention by SBC/BSC, shows that Ameritech was ousted to avoid violation of the MFJ; Ameritech's April 15, 1996 letter acknowledges that an MFJ violation would have occurred were Ameritech a partner prior to the passage of the Telecom Act of 1996. TCLP was not going to be in the position of violating Federal communications law, Ameritech was rightfully ousted under the partnership agreement to avoid such violation, and Ameritech never sought judicial relief thereafter nor complained to the Commission that the Commission's ownership records were somehow erroneous. SBC/BSC chose to try to make the partnership agreement an issue in this case and their whining that TCLP is barred from discussing a document which they put into the record is obtuse.

6) TCLP's July 7, 2000 *Reply to Applicant's Response to Petition to Dismiss or Deny* provided a copy of an April 15, 1996 letter from Ameritech to TCLP which clearly states that

³ SBC/BSC are merely parroting TCLP's statement that "while the Commission is not concerned with contractual matters, TCLP shall respond to SBC/BSC's contract claims so that the Commission will be reminded why it does not become involved in such matters." *July 7, 2000 Reply to Applicant's Response to Petition to Dismiss or Deny*, at 3-4.

EX PARTE

as you are aware, Ameritech Cellular has been precluded in participating in the Thumb Cellular Limited Partnership because of our inter LATA restrictions. . . . we wish to discuss with you the details of resuming Ameritech's interest in the partnership.

7) The *July 21 Response* attempts to recant this clear admission concerning Ameritech's lack of partnership ownership interest. SBC/BSC claim that the letter writer is "a non-attorney," *July 21 Response*, at 3, and then discuss what "she was attempting to convey." *Id.* Whether Ameritech chose to have a non-lawyer make admissions is irrelevant to any issue in this proceeding. The statement says what it says and SBC/BSC's attempt to change the clear import of the words of the April 15, 1996 letter by way of "clarification" merely raises an issue which should be designated for hearing, that is, if the Commission should wish to pursue Ameritech, SBC, BSC's contractual "claim" to an ownership interest in TCLP.⁴

8) SBC/BSC claim that "SBC had a good faith basis for believing that Ameritech held a 23% limited partnership interest in Thumb when it filed the *pro forma* notification." *July 21 Response*, at 4. Was this purported "good faith" belief based upon an examination of the Commission's official licensing records? Was good faith demonstrated by their filing of applications which intended to affect the partnership without advising the partnership of the fact of the filings? Was their good faith demonstrated by seeking rule waivers from the Commission in order to avoid bringing the matter to the partnership's attention and in order to defeat the Commission's online security controls? Was their good faith demonstrated by filing contracts, contract amendments, and dispute settlement

⁴ SBC/BSC attempt to make hay out of their reading of a 1991 letter from TCLP to Ameritech. SBC/BSC claim that in view of the Telecom Act of 1996, "and because Thumb agreed that Ameritech could continue as a partner if that happened, it is hard to understand why Thumb continues to insist that there is no basis for SBC's claim." *July 21 Response*, at 4. The obvious response, which just about beats you over the head, is that "Ameritech has made no capital contributions . . ." *July 7, 2000 Reply to Applicant's Response to Petition to Dismiss or Deny*, at 5. SBC/BSC fail to address this point and SBC/BSC fail to explain the theory under which TCLP is required to give away a valuable ownership interest.

EX PARTE

documents with the Commission and then by claiming that it is TCLP which is raising a contractual issue?

9) To the contrary, the evidence is strong that SBC/BSC have acted in bad faith not only regarding TCLP by making back door ownership change filings, but also with the Commission by filing bogus ownership change applications which application contained rule waiver requests which were intended to defeat the security controls built into the Commission's online filing system. Ameritech/SBC/BSC continue to prosecute bogus ownership change applications in the face of 1) the licensee's sworn statement that neither Ameritech, SBC, nor BSC are partners in TCLP, 2) the Commission's official licensing records which clearly show that neither Ameritech, SBC, nor BSC are partners in TCLP, and 3) Ameritech's own April 15, 1996 letter which states point blank that Ameritech is not a partner.⁵ SBC and BSC's assertion of good faith is not supported at all by the facts.


WHEREFORE, in view of the information presented herein, it is respectfully submitted that the captioned applications must be denied.

⁵ SBC/BSC suggest that "the Commission should take this opportunity to clarify that such filings need not be made in the future." *July 21 Response*, at 4 n. 8. This statement suggests that Ameritech/SBC/BSC's bogus filings are required by the Commission. The Commission does not require the filing of fraudulent ownership change applications. SBC/BSC's assertion that the Commission must change or clarify a policy so that they are not placed in this position is absurd. There is no theory which supports the under handed filing activity engaged in by Ameritech and SBC. The Commission's official licensing records do not show Ameritech nor SBC as an owner. If one were to delve into state contract law, neither Ameritech nor SBC has paid any capital into TCLP and no ownership interest exists. It was wholly within SBC/BSC's power to avoid this situation by not filing the applications in the first place and TCLP provided Ameritech/SBC with an opportunity to withdraw the offensive filings and provided them with the Commission's official ownership records. Regardless, Ameritech/SBC/BSC have chosen to press forward. The facts of this case do not call for a rule change or clarification, it is not the Commission's processes which are at fault here.

EX PARTE

Hill & Welch
1330 New Hampshire Ave., N.W. #113
Washington D.C. 20036
(202) 775-0070
(202) 775-9026 (FAX)
e-mail: welchlaw@clark.net
July 27, 2000

Respectfully submitted,
THUMB CELLULAR LIMITED PARTNERSHIP



Timothy E. Welch
Its Attorney

EX PARTE

CERTIFICATE OF SERVICE

I hereby certify that I have this 27th day of July 2000 sent a copy of the forgoing RESPONSE TO JULY 21 EX PARTE RESPONSE OF SBC AND BELL SOUTH TO REPLY TO APPLICANT'S RESPONSE TO PETITION TO DISMISS OR DENY by First-Class United States mail, postage prepaid, to the following:

Office of Public Affairs
Reference Operations Division
445 12th Street, SW #CY-A257
Washington, D.C. 20554

Wayne Watts
SBC Communications, Inc.
175 East Houston
San Antonio, TX 78205

Lauren Kravetz
Commercial Wireless Division
Wireless Telecommunications Bureau
445 12th Street, SW #4-A163
Washington, D.C. 20554

Charles Featherstun
Alloy LLC
1155 Peachtree Street #1700
Atlanta, GA 30309

Michael Samsock
Commercial Wireless Division
Wireless Telecommunications Bureau
445 12th Street, SW #4-A131
Washington, D.C. 20554

ITS
445 12th Street, SW #CY-B402
Washington, D.C. 20554

James G. Harralson
BellSouth Corp.
1155 Peachtree Street, N.E. #1700
Atlanta, GA 30309-3610

Monica Desai
Public Safety and Private Wireless Division
Wireless Telecommunications Bureau
445 12th Street, SW #4-A232
Washington, D.C. 20554

L. Andrew Tollin
Wilkinson Barker Knauer, LLP
2300 N Street, N.W. #700
Washington, D.C. 20037

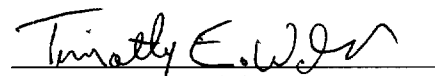
Justin Connor
Telecommunications Division
International Bureau
445 12th Street, SW #6-A832
Washington, D.C. 20554

James D. Ellis
SBC Communications
175 E. Houston
San Antonio, TX 78205

Carl Huie
Experimental Licensing Branch
Office of Engineering and Technology
445 12th Street, SW #7-A361
Washington, D.C. 20554

Patrick J. Grant
Arnold & Porter
555 12th Street, N.W.
Washington, D.C. 20004

Kellye Abernathy
Abilene SMSA Limited Partnership
17330 Preston Road #100A
Dallas, TX 75252


Timothy E. Welch